Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JOSEPH P. GALLUZZI,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues for review on behalf of the petitioner, Joseph P. Galluzzi ("Galluzzi"), are as follows:

I. Whether the District Court and the Third Circuit utilized an improper standard of proof for upward adjustment given defendants advanced age and the profound effect of defendant's sentence?

II. Whether the Third Circuit disregarded precedental law in other circuits in applying a preponderance standard to Obstruction of Justice adjustments?

III. Whether the District Court erred in admitting documents into evidence without subjecting them to a relevance inquiry?

IV. Whether the District Court erred in failing to dismiss the indictment despite the prosecutorial misconduct of the United States Attorney during the grand jury proceeding?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE BASIS OF JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

ARGUMENT 7

I. THE TRIAL COURT IMPROPERLY ADJUSTED APPELLANT'S SENTENCE UPWARD AND THE MATTER SHOULD BE REMANDED FOR RESENTENCING 7

II THE COURT ERRED IN CONCLUDING THAT AN UPWARD ADJUSTMENT FOR OBSTRUCTION OF JUSTICE WAS APPROPRIATE BECAUSE IT UTILIZED A PREPONDERANCE OF EVIDENCE STANDARD RATHER THAN CLEAR AND CONVINCING. 15

III. DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT IMPROPERLY ADMITTED INTO EVIDENCE DOCUMENTS THAT WERE NOT SUBJECTED TO RELEVANCY INQUIRY 17

IV THE UNITED STATES ATTORNEY'S OFFICE ENGAGED IN PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY WHICH SHOULD HAVE RESULTED IN A DISMISSAL 20

CONCLUSION 26

APPENDIX

THIRD CIRCUIT JUDGMENT 1a

DISTRICT COURT JUDGMENT 2a

FEDERAL RULES OF EVIDENCE EXCERPTS 7a

TRANSCRIPT EXCERPTS 9a

PLEADINGS EXCERPTS 285a

EXHIBITS EXCERPTS ..... *lodged*

TABLE OF AUTHORITIES

CASES: PAGE

Beachum v. Lee-Morse, 714 F.2d 1010, 1014 (10th Cir. 1987). 18

SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C.Cir.) (*en banc), cert. denied,* 449 U.S. 993, 101 S. Ct. 529, 66 L.Ed.2d 289 (1980), ... 22

SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978). 21

United States v. Arnold, 106 F. 3d 37 (3d Cir.1997); 15

United States v. Bertol, 40 F.3d 1384 (3d Cir.1994); 8

United States v. Dwyer, 539 F.2d 924, 928 (2nd Cir. 1976). 18

United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997). 15

United States v. Hays, 872 F.2d 582, 587 (5th Cir. 1989). 19

United States v. Kikumura, 918 F. 2d. 1084 (3rd Cir. 1990). 7

United States v. LaSalle Nat'l Bank, 437 U.S. 298, 98 S. Ct. 2357, 57 L.Ed.2d 221 (1978), ... 21

United States v. Lawson, 502 F. Supp 158, 165 (D.Md. 1980). 21

United States v. Montaque, 40 F.3d 1251 (D.C. Cir.1994) 15

United States v. Russo, 517 F. Supp 83, 86 (E.D. Mich. 1981); 21

United States v. Schiff, 612 F.2d 73 (2nd Cir. 1979). 17

United States v. Schipani, 289 F. Supp. 43 (E.D. N.Y. 1968), ... 17

United States v. Smith, 687 F.2d 147, 148 (6th Cir. 1982). 21

United States v. St. Julian, 922 F. 2d 563, 569 (n.1)(10th Cir. 1990) 8

United States v. Subin, 56 F. 3d 1423 (D.C. Cir. 1995) 15

United States v. Williams, 545 F.2d 47, 50 (8th Cir. 1976). 17

STATUTES:

N.J.S.A. 40A:2-1 et. seq 11

N.J.S.A. 40A:2-3 11

N.J.S.A. 40A:4-64 et. seq 10

U.S.S.G. § 3C1.1 15

UNITED STATES CONSTITUTION:

U.S. CONST. AMEND. V 21

OPINIONS BELOW

The unpublished opinion and judgment of the Court of Appeals for the Third Circuit was entered on May 28, 1999. The order of that court is set out in Appendix, 1a. The judgment including sentencing of the United States District Court for the District of New Jersey is set out in the Appendix, 2a.

STATEMENT OF JURISDICTION

Defendant, Galluzzi, was indicted in October of 1996 and charged with mail fraud, bribery, deprivation of honest services and related charges. In January of 1997 a superceding indictment was filed which contained 26 counts was filed. In March and April of 1998, a trial was conducted before the Honorable William H. Walls, U.S.D.J. On April 24, 1998, Galluzzi was convicted of all counts of the superceding indictment.

On September 10, 1998, Judge Walls sentenced Galluzzi to a term of imprisonment of 90 months with a term of three years supervised release to follow thereafter.

On September 16, 1998, a Notice of Appeal was filed in compliance with Rule 10(a) of the Federal Rules of Appellate Procedure (285a).

On May 27, 1999, the United States Court of Appeals for the Third Circuit affirmed the conviction and sentence of the District Court. This petition is hereby timely filed. The Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C.A. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Galluzzi was convicted at trial of mail fraud in violation of 18 U.S.C. §§ 1341,1343, which read in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises...for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon... §3141.

> Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representatives or promises, transmits or causes to be transmitted by means or wire, radio, or television communication...§ 1343.

STATEMENT OF THE CASE

Counts 1 through 11 of the superceding indictment alleged that Galluzzi knowingly devised a scheme and artifice to defraud and obtain money and property from Essex County ("Essex" or "County"), the Township of Irvington

Essex and Irvington, and First Fidelity the right to honest services. (186a). In substance, these Counts alleged that Galluzzi caused a First Fidelity vice president to agree to pay kickbacks to Galluzzi without public awareness as a reward for directing county business to First Fidelity. These counts further allege that Galluzzi caused 11 documents to be transmitted through the United States Mail as a part of this scheme in violation of 18 U.S.C. §§§ 1341, 1343, 1346.

Counts 12 through 15 alleged that Galluzzi knowingly devised a similar scheme as above. Here, it was maintained by the Government that Galluzzi caused a First Fidelity vice president to agree to pay kickbacks to Galluzzi without public knowledge as a reward for directing Essex County municipal bond underwriting business to First Fidelity. (186a).

In Count 16, the Government alleged that Galluzzi designed another scheme wherein he intended to defraud A.G. Edwards, Essex, and the citizens therein. (186a). According to this scheme, Galluzzi allegedly caused an A.G. Edwards vice president to agree to pay kickbacks to Galluzzi as a reward for his efforts in directing municipal bond underwriting business to A.G. Edwards.

Improper Introduction of Documents

At trial, in an apparent attempt to streamline the trial, the Government introduced and the Court admitted the documents listed L-1 (a) and L-2 (a) without conducting an examination of relevancy mandated by FED. R. EVID. 401 (7a) and an evaluation of prejudice. Both L-1 (a) and L-2 (a) documents created by FBI agents purported to provide a listing of documents seized during various searches. At the time of introduction, and over defendant's objection, each document was introduced solely on the assertion that they

were seized from Appellant's place of business. The Government was not required by the court to make a proffer regarding any specific document. A majority of the documents were not the subject of testimony either. A majority of these documents were not referenced by any witnesses. As a result, the defendant's tax returns were admitted without any testimony simply because they were seized at defendant's office. Also, Financial Statements (Lodging p. 18), Spread Sheets (Lodging p. 21), draft letters (Lodging p. 23), meeting agendas (Lodging p. 27), were submitted to the jury, were made a part of the record, and were made available to the jury for deliberations, but were never the subject of proper court scrutiny.

Significantly, on rebuttal summation, the Government read from and commented about a document (SA-12) submitted en masse with others and without review. In this summation the government contended that the document was a draft resignation letter from Galluzzi to Nick Amato, a former Essex County Executive. The Court never discussed this document. There was no testimony authenticating it, identifying its author, or even as to whether it was a draft or for whom it was intended. The result was that the Government was able to use the document and impermissibly testify as to its meaning without any foundation whatsoever.

Improper use of SEC Civil Investigation

In the course of its-investigation and prosecution prior to indictment and thereafter, the United States Attorney's Office gained information and testimony from its joint civil and criminal investigation through the use of the SEC's subpoena power and the information gained was specifically

Witness after witness was deposed by the SEC and preserved for use at trial. This tactic was compounded when the Government refused to provide access to discovery materials, and testimony of important fact witnesses was withheld from defendant until the last days of trial. (151a-284a,).

Sentencing

At the Sentencing Hearing, Appellant's counsel urged the Court to employ a clear and convincing standard for departure from the Guidelines. (20a-21a). The court did not contest counsel's statement and the government made no assertion that the standard was anything but clear and convincing. (20a-21a). Despite this and despite the fact that the upward adjustment had a profound effect on defendant's sentence the District Court erroneously held the Government to a mere preponderance of the evidence standard.

The Court was urged to make an upward departure based on a valuation of loss, to which Defendant objected. In considering Galluzzi's objection to an upward adjustment based upon a $4.7 million dollar loss arising out of a 1989 $104 million dollar bond deal, the Court entertained conflicting testimony of two experts. Mark Egland testified for the Government; the other, Philip Ferrand was retained by Galluzzi.

Both individuals testified at length and both submitted various reports to the court. The court, however, chose to accept Mr. Egland's conclusions without any consideration of Mr. Ferrand's.

Mr. Egland simply stated that the bond deal was not a good deal because there was not an interest rate saving. Mr. Egland forwarded that opinion without knowledge concerning the restrictions on issuing of bonds that were placed by New Jersey law, without an understanding of the financial binds of Essex County, and without understanding the political realities of the County at the time of issuance. In fact, Mr. Egland made no effort and did not testify as to why the bonds were, or would have been issued.

Eventually, the court relied on an inexperienced, uninformed expert who concluded that bonds issued with the consent of the County Executive, the Board of Chosen Freeholders and the Local Finance Board were not the only solution to solve the counties economic woes. Mr. Egland's testimony simply ignored standard Accounting practices as promulgated by the Governmental Accounting Standards Board. Such ignorance compels the conclusion that his testimony is entirely without merit.

Conversely, Mr. Ferrand possessed a great deal of experience, specifically relating to municipal bond underwriting. (24a-25a). Ferrand testified that he, unlike Egland, has specifically served as a consultant to both financial advisors and managing underwriters in developing funding plans. (24a-25a).

Mr. Ferrand testified that Mr. Egland, in rendering his opinion, omitted 6.1 million dollars in benefits to the County. (40a). Mr. Ferrand also testified as to other benefits to the county, such as how the county benefited from the creation of a $25 million capital improvement fund. (67a-68a). Ferrand testified, in sum, that Egland omitted certain figures from his calculations.

The court, however, accepted the testimony of Government's expert stating that "I find that Mr. Egland's calculations more likely than not are acceptable." (118a).

Additionally, at sentencing the District Court erroneously utilized a preponderance standard when attributing to Galluzzi an upward adjustment for obstruction of justice. In affirming this decision the Third Circuit Court of Appeals is in conflict with rulings of other circuits and as such Supreme Court review is warranted.

CONTENTIONS IN SUPPORT OF THE PETITION FOR WRIT OF CERTORIARI

POINT I

THE TRIAL COURT IMPROPERLY ADJUSTED APPELLANT'S SENTENCE UPWARD AND THE MATTER SHOULD BE REMANDED FOR RESENTENCING.

It is respectfully submitted that the trial court clearly erred by imposing a preponderance standard and as such, upon a de novo review, the matter must be remanded for resentencing. It is also respectfully submitted that this Honorable Court has not presently addressed the issue of whether advance age of defendant should be a consideration in determining the effect of sentencing adjustment. As such the matter is ripe for review.

In so arguing the Appellant recognizes that the standard of proof in the Third Circuit for upward adjustments is generally preponderance of the evidence. *United States v. Kikumura*, 918 F. 2d. 1084 (3rd Cir. 1990). The appellant however urges that pursuant to *Kikumura,* the issue of the 4.7 million dollars loss to the county is so profound to the life

departure must be found by clear and convincing evidence. *See Kikumura*, 918 F. 2d at 1101; *See also United States v. Bertol*, 40 F.3d 1384 (3d Cir.1994); *United States v. St. Julian*, 922 F. 2d 563, 569 (n.1)(10th Cir. 1990) ("If the difference between the guidelines range and the departure sentence is great, the trial court should consider the implications of that disparity in determining the appropriate standard of proof for the facts considered in sentencing."). Simply put, because the application of this loss doubled Mr. Galluzzi's sentence, the District Court should not have applied it unless it was supported by clear and convincing evidence. It is critical to this review that the courts determination that an upward adjustment was warranted had a most profound effect on the defendant. Specifically, defendant Galluzzi was 66 years old at the time of sentencing. The application of this adjustment which transformed Galluzzi's sentence from 3 1/2 to 7 1/2 years is tantamount to a life sentence. The age of Galluzzi at time of sentencing mandates a higher standard of proof than preponderance of the evidence. It is submitted the issue of advanced age and its effect on loss calculation burden of proof has not been resolved by the circuits and as such Supreme Court review is warranted.

In addition it must be noted that the District Court who obviously confused as to what standard to apply. Appellant's counsel stated at sentencing that a clear and convincing standard should apply. (20a-21a). The court did not contest Counsel's statement and the government made no assertion that the standard was not clear and convincing. In rendering its opinion, however, the Court accepted the testimony of Government's expert stating that "I find that Mr. Egland's calculations more likely than not are acceptable ." It is submitted that the uncertainty of the court coupled with the tremendous affect the decision had on Appellant's

sentence mandate a de novo review resulting in clarification for the trial court as to the appropriate standard and remand for resentencing.

It is respectfully submitted that the application of a $4.7 million dollar loss for sentencing purposes was so clearly and obviously erroneous that in the interest of justice this Honorable Court must intervene. The court applied incorrect standard of proof, clearly misunderstood the testimony of the expert upon which its ruling was based and simply ignored the inadequacies of the Government expert. The result, which proved so significant in dramatically increasing plaintiff's sentence mandates this Court's intervention.

In considering defendant's objection to an upward adjustment based upon a $4.7 million dollar loss arising out of a 1989 $104 million dollar bond deal, the Court entertained conflicting testimony of two experts. The first, Mark Egland was retained by the Government; the other Philip Ferrand, was retained by Joseph Galluzzi. Both individuals were paid for their opinions and appearances.

Despite the fact that both individuals testified at length and both individuals submitted reports to the Court, the Court clearly demonstrated a bias in favor Mr. Egland and for no discernable reason chose to rubber stamp Mr. Egland's conclusions. In doing so, the Court ignored several aspects of Mr. Egland's testimony that clearly undermines his credibility and the merit of his conclusions. Among the things the court ignored included:

1. That Mr. Egland did not interview one person associated with the County of Essex;

2. That Mr. Egland did not interview one person who sat on the Local Finance Board; (52a-53a).

3. That Mr. Egland never spoke to anyone from First Fidelity; (54a-55a).

4. That Mr. Egland never spoke to anyone form the Local Finance Board; (148a-149a).

5. That Mr. Egland made no effort to determine for what purpose the relevant Bonds were being issued; (108a-109a).

6. That Mr. Egland discounted the tremendous cash flow problems the County was experiencing at the time of the referenced Bond issuance; (102a-103a)

7. That Mr. Egland was not familiar with several financial obligations imposed by government regulations; (104a-105a).

8. That Mr. Egland suggested in his testimony that to raise funds, the county could have mortgaged property that was owned; (106a). (In doing so, Mr. Egland was not aware New Jersey Law prohibits such a sale).

9. That Mr. Egland stated in his testimony that the County could have issued Tax Anticipation Notes ("TANs") as an alternative to the $104 million dollar Bond deal; (106a); (TANs are obligations issued in anticipation of tax revenues. Under New Jersey Law, referred to as Local Budget Law, N.J.S.A. 40A:4-64 et. seq., TANs can be renewed from time to time but "all such notes and any renewals thereof shall mature... in the case of counties not later than June 30th of the succeeding fiscal year. Consequently, the mere issuance of TANs could not have successfully resolved the cash flow deficit as the County would have needed to raise money in either the 1989 or 1990 budget to pay off such notes. Therefore, the issuance of TANs to solve this deficit is spurious because they can only be used for short term cash flow problem);

10. That Mr. Egland stated in his testimony that the County could have issued a smaller bond issue. (In his testimony and his analysis, Mr. Egland indicates the County could have floated a bond issue of approximately $5-$10 million to cover the deficit in operations. Under New Jersey Statutes, referred to as Local Bond Law (N.J.S.A. 40A:2-1 et. seq.), governmental entities are specifically prohibited from issuing bonds to cover operational costs. N.J.S.A. 40A:2-3 specifically indicates that a local unit can incur indebtedness for capital improvements or property, any purpose for which it is authorized or required by law to make an appropriation, except for current expenses and payment of obligation. Consequently, Mr. Egland's assertion that the County could have issued "a five or $10 million issue" is erroneous and could not be legally accomplished in 1989 or even under current statutes);

11. Mr. Egland made no attempt to determine whether State and Federal tax aid to Essex County had been eliminated causing financial problems; (108a-109a);

12. That the problems with the Bond issue identified by Mr. Egland were discussed by the Board of Chosen Freeholders prior to their agreement to going forward with the issue; (117a);

13. The fact that Mr. Egland relied upon a government exhibit CH-12 for his figures, which attributed to Galluzzi information provided not by Galluzzi but by the public finance department of First Fidelity Bank; (119a);

14. That Mr. Egland refused to opine as to political or public policy reasons that may have affected the decision to issue the bonds; (122a)

15. That Mr. Egland was not familiar with the laws of New Jersey concerning the issuance of bonds; (126a), and Mr. Egland failed to produce his work papers identifying his methods.

Each of the above clearly demonstrate at the very least that Mr. Egland's opinion was without merit. Mr. Egland simply stated that the bond deal was not a good deal because there was not an interest rate saving. Mr. Egland forwarded that opinion without knowledge concerning the restrictions on issuing of bonds that were placed by law. Mr. Egland forwarded that opinion without an understanding of the dire financial condition of Essex County. Mr. Egland forwarded the opinion without understanding the political realities of the County at the time of issuance. Finally, Mr. Egland did not even bother to determine why the bonds were issued.

In reality, the court relied on an inexperienced, uninformed expert who concluded that bonds issued with the consent of the County Executive, the Board of Chosen Freeholders and the Local Finance Board were not the only solution to solve the counties economic woes. The Court ignored the fact that the expert could point to no viable alternatives and that the alleged problems with the issue were known to the Board of Chosen Freeholders, were discussed and ultimately discounted.

In reaching its conclusion the Court entirely ignored the testimony of Mr. Fillip Ferrand who opined that the 104 million dollar bond deal benefited the county in an amount of approximately 2.7 million dollars. Mr. Ferrand reached this conclusion after carefully examining the bond issue as well as the bonds to be refunded. (39a). Mr. Ferrand testified in his capacity as an expert with tremendous amount of practical experience, and had participated in hundreds of similar deals. As opposed to Mr. Egland who had little or no practical experience having dealt with only 10 or 15 hundred related issues, Mr. Ferrand testified that he developed the software program relied upon by approximately 40% of the top 100

program relied upon by approximately 40% of the top 100 municipal bond underwriters. (24a-25a). Mr. Ferrand has specifically served as a consultant to both financial advisors and managing underwriters in developing funding plans totally tens of billions of dollars.

Specifically, Mr. Ferrand carefully detailed and documented that Mr. Egland, in rendering his opinion, omitted 6.1 million dollars in benefits to the County. (40a). Mr. Ferrand also pointed out benefits to the county in that the county benefited from the creation of a $25 million dollar capital improvement fund. (65a).

Despite this testimony and the carefully detailed report submitted to the court by Mr. Ferrand, the Court dismissed Mr. Ferrand's testimony out of hand. In attempting to justify its decision, the Court stated the following:

> Now, I reject Ferrand's analysis because frankly it doesn't even make, it doesn't make common sense. One doesn't have to be an astute mathematician which the court is not to use Ferrand's figures to calculate from his present value analysis summary that if we reduced other benefits to $700,000, there would be a loss of $2,723,236.26. So I don't understand how a loss becomes a positive. That's how I believe and I find that Mr. Egland's calculations more likely than not are acceptable. (118a).

Quite frankly, neither Mr. Egland nor Mr. Ferrand testified to a loss of approximately $2.7 million. As such, the Court was either confused or just arbitrarily dismissed Ferrand's calculations.

determined what effect if any the advanced age of defendant should have in relation to standard of proof issues. Additionally, and most importantly the issue of which standard of proof applies is critical due to the insufficient proofs submitted as well as the District Court's obvious confusion. Finally, the severity of the courts mistake and the injustice imposed upon Galluzzi mandate Supreme Court review.

POINT II

THE COURT ERRED IN CONCLUDING THAT AN UPWARD ADJUSTMENT FOR OBSTRUCTION OF JUSTICE WAS APPROPRIATE BECAUSE IT UTILIZED A PREPONDERANCE OF EVIDENCE STANDARD RATHER THAN CLEAR AND CONVINCING.

At time of sentencing, over the objection of the defendant, the Court concluded that an upward adjustment pursuant to U.S.S.G. § 3C1.1 was appropriate based upon defendant's testimony before the SEC. (115a). Specifically, the Court ruled that by a preponderance of the believable evidence, the defendant perjured himself. (115a-116a). In affirming the District Court's decision, the Third Circuit Court of Appeals has ruled in conflict with previous Third Circuit opinions as well as those of other circuits. Therefore, review by this Court is warranted.

For example, the Third Circuit has specifically stated that only in situations when clear and convincing evidence of perjury or obstruction of justice exist, is an upward adjustment pursuant to U.S.S.G. § 3 C1.1 lawful. *See United States v. Arnold,* 106 F. 3d 37 (3d Cir.1997); *see also United States v. Montaque,* 40 F.3d 1251 (D.C. Cir.1994) (District Court's upward adjustment reversed because finding was based upon preponderance of the evidence; clear and convincing standard applies); *United States v. Subin,* 56 F. 3d 1423 (D.C. Cir. 1995) (clear and convincing standard appropriate); *United States v. Gabriel*, 125 F.3d 89 (2d Cir. 1997).

The significance of this standard is clear due specifically to the fact that the court predicated its ruling on

Securities and Exchange Commission ("SEC"). The Court focused exclusively on statements that Galluzzi claimed to have performed for AG Edwards. The Court's conclusion that Galluzzi performed no work for A.G. Edwards is directly contradicted by the testimony before the SEC of Timothy McDonough, a former A.G. Edwards Vice President. Due to Mr. McDonough's unavailability at trial, his SEC testimony was read into the record. (199a). As a review makes clear, Mr. McDonough specifically supports Mr. Galluzzi's contention that he performed work for A.G. Edwards and was compensated as a result. The paucity of proof in this regard underscores the necessity for review. In erroneously applying a less stringent proof standard the District Court and Third Circuit have created an untenable position the result of which Galluzzi's sentence was increased based upon insufficient proof. As such, review is warranted. Such testimony, contradicting the court's conclusion mandates remand to the Court for consideration of this issue under the proper standard.

POINT III
DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT IMPROPERLY ADMITTED INTO EVIDENCE DOCUMENTS THAT WERE NOT SUBJECTED TO RELEVANCY INQUIRY.

The Third Circuit affirmed the District Court's decision to allow over objection of defense counsel the Government to introduce in excess of 100 documents in government exhibits L1 (a) and L2 (a). (See Lodging pp. 1-17). It was submitted that the admission of these documents was improper in that a vast majority of them were not the subject of further testimony and as such the Court was not able to assess the relevancy of the documents or the potential for substantial prejudice to the defendant. While the government may have represented to the court that additional testimony would be adduced establishing relevance, such testimony was not received.

In affirming the decision to admit such documents the Third Circuit is in conflict with established law in other circuits. For example, it is clear that if either side proffers for admission documentary evidence, it is incumbent upon the court to make a determination as to each document whether that particular piece of evidence is relevant. *See United States v. Schiff*, 612 F.2d 73 (2nd Cir. 1979). The determination as to relevance is to be determined by the trial judge and is not properly left to the jury. *See id.* at 80; *see also United States v. Williams*, 545 F.2d 47, 50 (8th Cir. 1976). In properly exercising its function, the Court is obligated to make a specific determination as to each piece of evidence offered, that "a reasonable man might have had his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted." *United States v. Schipani*, 289 F. Supp. 43 (E.D. N.Y. 1968),

922, 90 S. Ct. 902, 25 L.Ed. 2d 102 (1970). Only upon such a determination is a document properly admissible.

The procedure that was proposed by the Government and utilized in this case proved to be improper because while the government may have represented that relevancy testimony would be received as to each document listed in L1 (a) and L2 (a), that was not the case. As a result, a specific inquiry as to each document was not undertaken, and the determination of relevancy was improperly left to the jury.

Similarly, due to the procedure proposed by the Government, the court made no inquiry as to the prejudicial effect that each item might have had. FED. R. EVID. 403 mandates that even if a determination is made as to the relevancy of a particular item, the Court must also determine that the probative value of such evidence is substantially outweighed by the danger of introducing unfair prejudice, confusion of the issues, or misleading the jury. (7a).

In this instance the Court is charged with the duty to confront this issue "explicitly, acknowledging and weighing both the prejudice and the probative worth of the proffered testimony." *United States v. Dwyer*, 539 F.2d 924, 928 (2nd Cir. 1976).

It is true that appellate courts generally grant the trial courts broad discretion to determine whether evidence is relevant, and its decision will be reversed on appeal upon a showing of clear abuse of that discretion. *See Beachum v. Lee-Morse*, 714 F.2d 1010, 1014 (10th Cir. 1987). The same standard applies to a court's 403 determination. However, a District Court's decision does not need to be outlandish or malicious to rise to the status of clear abuse. Rather, the reviewing court need only be firmly convinced that a mistake

has been made. *See United States v. Hays*, 872 F.2d 582, 587 (5th Cir. 1989).

It is simply stated that in introducing the documents listed L-1 (a) and L-2 (a) without conducting an examination of relevancy mandated by FED. R. EVID. 401 and an evaluation of prejudice if relevancy is determined pursuant to Rule 403, the trial court made a reversible error. While conceding that many of the documents were referenced by other witnesses, a majority of them were not. The result was that documents which were never scrutinized by the Court and admitted over objection were available to the jury for their review. For example, the defendant's tax returns were admitted without any testimony simply because they were seized at defendant's office. There simply was and is no reason for defendant's personal tax returns to be available to the jury simply because they were located in defendant's office. Similarly, Financial Statements (Lodging p. 18), Spread Sheets (Lodging p. 21), draft letters (Lodging p. 23), meeting agendas (Lodging p. 27), are other examples of documentation made a part of the record, and made available to the jury for deliberations, but were never the subject of proper court scrutiny.

Of particular interest is the fact that in rebuttal summation, the Government read from and commented about a document (SA-12) that they purported was a draft resignation letter from defendant to Nick Amato, a former Essex County Executive. The Court never discussed this document. There was never testimony authenticating it, identifying its author, indicating whether it was a draft or for whom it was intended. The extent of the improper prejudice visited upon the defendant can not better be explained than by the fact that it was this document that A.U.S.A. Marra improperly utilized in his last remarks to the jury. The question must be asked upon

was this document attributed to the defendant and why did the government deem it so important that it was relied upon in rebuttal summation? Since the Court never asked these questions, Defendant Galluzzi was never entitled to contest the Government's assertions.

This failure to make a specific inquiry as to the relevance of each document, leaving that determination up to the jury is reversible error and as such, the conviction must be overturned.

POINT IV

THE UNITED STATES ATTORNEY'S OFFICE ENGAGED IN PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY WHICH SHOULD HAVE RESULTED IN A DISMISSAL.

It is respectfully submitted that the Government's use of and consults with a SEC civil investigator so undermines the process involved here that this Honorable Court must intervene to insure that this defendant's rights are protected.

The Fifth Amendment to the United States Constitution provides that every person is afforded the right to due process and indictment only by action of a grand jury. It states in pertinent part:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor be deprived of life, liberty, or property, without due process of law...

U.S. CONST. AMEND. V. Prosecutors may abuse this process and thus commit actionable misconduct by using civil investigative powers to circumvent the appropriate grand jury proceedings. *See United States v. Smith*, 687 F.2d 147, 148 (6th Cir. 1982). Administrative inspection warrants used by a prosecutor to gather evidence for a criminal prosecution are clearly improper. *See United States v. Russo*, 517 F. Supp 83, 86 (E.D. Mich. 1981); *United States v. Lawson*, 502 F. Supp 158, 165 (D.Md. 1980). If the basic purpose of the warrant or subpoena is one related to civil proceedings and not to a criminal investigation, its use in a criminal investigation is an improper subterfuge and should be challenged by counsel. *See United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 314 (1978); *SEC v. Gilbert*, 79 F.R.D. 683 (S.D.N.Y. 1978).

For example, in *United States v. LaSalle Nat'l Bank,* 437 U.S. 298, 98 S. Ct. 2357, 57 L.Ed.2d 221 (1978), the Supreme Court held, *inter alia*, that the Internal Revenue Service must use its summons authority in good faith when pursuing a civil/criminal investigation. *LaSalle* involved an IRS agent who was using summonses to obtain evidence for a criminal investigation. *See id.* The Court held that in order to demonstrate bad faith, a complainant has to show that the agency issued the summons for a purpose other than those authorized by Congress. *Id.* at 314.

The case of *SEC v. Gilbert*, and the case at hand are similar in many respects. For example, in *Gilbert*, the defendant requested a protective order to block disclosure of information to the U.S. Attorney from the SEC, under the discovery rules of the Federal Rules of Civil Procedure. *See* 79 F.R.D. at 684. The district court in *Gilbert* determined such disclosure would be improper, and it ordered the SEC "not to furnish the U.S. Attorney specially with any

Similarly, in *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.Cir.) (*en banc), cert. denied,* 449 U.S. 993, 101 S. Ct. 529, 66 L.Ed.2d 289 (1980), a case which also involved SEC participation, the United States Court of Appeals for the District of Columbia held that a party under investigation must show either that his rights will be prejudiced or that the investigating agency is acting in bad faith or using malicious tactics. *See id.* Presently, defendant's Fifth Amendment rights were violated and the civil investigation was improperly used by the Government to indict the defendant and compounded by the referral of access to SEC documents relating to this matter.

The court in *Dresser,* however, failed to discuss or acknowledge the extreme prejudice involved in due process violations. Due process requires indictment solely through the grand jury process that is afforded its own broad subpoena power and tempered with procedural safeguards. For the United States Attorney's Office to use the subpoena or discovery power of an administrative agency is an example of clear circumvention of the grand jury indictment process and due process guarantees of the Fifth Amendment.

Defendant asserts that in this case, the United States Attorney's Office conducted a criminal investigation in conjunction with the civil investigation of the SEC in order to avoid the constitutional requirement that indictments be secured only through a grand jury. The Government repeatedly admitted at trial that it engaged in an investigation with the SEC in order to gain criminal discovery. It even argued during pretrial motions and during the trial to keep the testimony and information from that investigation away from the defense, classifying it as criminal discovery.

The criminal division of the United States Attorney's Office is restricted to conducting investigations before a grand jury. However, in this matter the United States Attorney's Office utilized the civil investigative power of the SEC to gain information to forward its criminal investigation. The real investigating body in issuing the SEC subpoenas was the United States Attorney's Office, which should have gotten its subpoenas from a grand jury.

Since the United States Attorney's Office was involved in the investigation and controlled the issuance of subpoenas, these subpoenas issued under the auspices of the SEC were improperly used for the sole and dominant purpose of obtaining discovery, which material testimony or information was used in obtaining an indictment and its criminal prosecution. The subpoenas, therefore, were used for an improper purpose.

The United States Attorney's Office gained information and testimony from its joint civil and criminal investigation through the use of the SEC's subpoena power and the information gained was specifically utilized in the Government's opening statement as well as throughout the trial. More importantly, defendant was denied access to any of the testimony or information gained by the SEC. This denial was first done by the Government and then by the Court itself when defendant's subpoena of the SEC testimony was quashed. (151a). When apprised of the extent of the inquiry conducted under the auspices of the SEC, defendant issued a subpoena to review the record. The Government opposed these subpoenas and they were quashed by the Court. (151a). Clearly from this circumstance, the Government as well as this Court deemed the discovery obtained through the SEC subpoena power as criminal discovery not available to the defendant.

Furthermore, the SEC testimony of important fact witnesses was withheld from defendant until the last days of trial, a situation that severely prejudiced the defendant in the preparation of his defense. It was only at this time that redacted copies of the SEC testimony of George Schneider, Timothy McDonough and Robert Brown were provided. No other information was provided. (151a-284a) These circumstances reinforce defendant's argument that the SEC, in issuing the subpoenas in this matter, was motivated by a criminal investigative purpose, and that the information gained through use of SEC subpoenas permitted the Government to improperly expand its criminal discovery rights in contravention of the guarantees of the Fifth Amendment.

The United States Attorney's Office must not be permitted to utilize civil enforcement powers in an investigation aimed at building or developing a criminal case. While cooperation between the United States Attorney's Office and executive agencies may be expected and even intended by Congress, there is no Congressional intent anywhere which justifies an interpretation or application that would expand the Justice Department's criminal discovery rights or allow due process violations, even potentially, by allowing the Justice Department to have an alternative to the role of the grand jury. The United States Attorney's Office must not be permitted to accomplish indirectly that which it is not permitted to do directly.

Consequently, and in light of the foregoing, the United States Attorney's Office committed actionable misconduct by using civil investigative powers to circumvent the appropriate grand jury proceedings. The misconduct rendered the proceeding against the defendant fundamentally unfair. As such, prejudice is presumed. Assuming, however, in the

alternative, that the misconduct has not rendered the proceeding fundamentally unfair, the misconduct has resulted in actual prejudice to the defendant. Accordingly, the indictment against the defendant should have been dismissed.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

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